IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-669

WILLIAM MESHRIY and
MURSELL MESHRIY, his wife,

Petitioners,

v.

SUN OIL COMPANY,
a New Jersey corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN ~~SUPREME COURT~~ COURT OF APPEALS

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INDEX

	Page
OPINIONS AND ORDERS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISION INVOLVED	4
STATEMENT OF THE CASE	4
REASONS FOR GRANTING WRIT —	
1. The Transcendent Importance Of Petitioners' First Question	10
2. The Blanket Sterilization Of Petitioners' Federal Due Process Claim	12
CONCLUSION	16

APPENDIX 1a-26a

CITATIONS

Federal:

	Page
Angel v. Bullington, 330 U.S. 183 (1946)	16
Betts v. Brady, 316 U.S. 455 (1941)	14
Cox v. Louisiana, 379 U.S. 559 (1965)	16
Davis v. Wechsler, 263 U.S. 22 (1923)	16
Groppi v. Leslie, 404 U.S. 496 (1972)	16
In re Murchison, 349 U.S. 133 (1955)	10, 11, 12
In re Oliver, 333 U.S. 257 (1948)	11, 12
Kinnear-Weed Corporation v. Humble Oil & Refining Company, 403 F.2d 437 (5 Cir. 1968)	12
Morgan v. United States, 304 U.S. 1 (1937)	14
Offutt v. United States, 348 U.S. 11 (1954)	11, 12
Ross v. Moffitt, 417 U.S. 600 (1974)	16
Titus v. Wallack, 306 U.S. 282 (1938)	16
Tumey v. Ohio, 273 U.S. 510 (1927)	11, 12
Ward v. City of Monroeville, 409 U.S. 57 (1972)	11, 12

State:

	Page
Irish v. Irish, 59 Mich. App. 635 (1975)	15
People v. Coleman, 350 Mich. 268 (1957)	12
State v. Johnson, 83 N.E. 702 (1908)	13-14
Wayne County Prosecutor v. Doerfler, 14 Mich. App. 428 (1968)	15

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PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

William Meshriy and Mursell Meshriy, his wife, the petitioners herein, pray that a writ of certiorari issue to the Michigan Supreme Court (the highest court of Michigan in which a decision can be had) to review an order denying the petitioners leave to appeal (and in effect finally affirming) a judgment of the Michigan Court of Appeals rejecting the petitioners' Fourteenth Amendment due process claim (denial of a fair trial in a fair tribunal) asserted in a Michigan trial court of first instance sitting in equity.

OPINIONS AND ORDERS BELOW

The order of the Michigan Supreme Court denying the petitioners leave to appeal is printed in Appendix A, infra, pages 1a-2a.

The opinion of the Michigan Court of Appeals, whose judgment finalized and affirmed in effect by the Michigan Supreme Court is herein sought to be reviewed, is printed in Appendix B, infra, pages 2a-6a, and is reported at 67 Mich. App. 709 (1976).

The order of the Michigan Court of Appeals denying the petitioners' application for rehearing is printed in Appendix C, infra, pages 6a-7a.

The opinion and judgment of the trial court of first instance are printed in Appendix D and in Appendix E, infra, pages 8a-11a, and pages 11a-12a, respectively.

The pertinent pre- and post-judgment orders of the trial court of first instance are printed in Appendix F and in Appendix G, infra, pages 12a-13a and pages 13a-14a, respectively.

JURISDICTION

The petitioners' timely application for leave to appeal was denied by the Michigan Supreme Court on August 18, 1976 (Appendix A, pages 1a-2a). The judgment of the Michigan Court of Appeals was entered March 9, 1976 (Appendix B, pages 2a-6a). The petitioners' timely application for rehearing was denied by the Michigan Court of Appeals on April 30, 1976 (Appendix C, pages 6a-7a). The jurisdiction of this Supreme Court to issue the requested writ of certiorari is conferred by 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I.

Whether the requirement of a fair trial in a fair tribunal, as guaranteed by the Due Process Clause of the Fourteenth Amendment, applies to state action in a state civil proceeding sounding in equity as it does to state action in a state criminal or quasi-criminal proceeding.

II.

Whether a state trial judge deprived petitioners of a fair trial in a fair tribunal, as guaranteed by the Due Process Clause of the Fourteenth Amendment, when he first entered an order granting petitioners a new trial upon a federal due process claim and motion therefor prior to any opinion or judgment on the merits of a civil proceeding sounding in equity, and then (a) by state investigatory action received and entertained, without notice to petitioners, a witness's letter of complaint and accusation so disparaging against the trial judge for granting a new trial as to make the judge an interested party, (b) entered an order adjourning a new trial after expressing ambiguous concern about said letter to counsel in chambers without disclosing either the accusatory and disparaging contents thereof or the existence of an accompanying investigatory letter by the Michigan Deputy Supreme Court Administrator, and (c) without notice, trial, motion or hearing subsequent to said order granting a new trial, the accused judge sua sponte filed an opinion permitting judgment to be entered against the petitioners as requested by said witness in his said complaining and accusatory letter first sent to the Chief Justice of the Michigan Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Due Process Clause of the first section of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

April 17, 1968, petitioners commenced their civil action in the Macomb County Circuit Court, a Michigan trial court of first instance, by the filing of a complaint requesting rescission of a certain lease and option to purchase between petitioners and respondent.

September 21, 1970, petitioners filed an amended complaint (pursuant to consent) in two counts sounding in equity alleging alternative claims for reformation or rescission of said lease and option.

March 17, 1971, trial commenced by taking of testimonial proofs (cross-examination of Walter C. Mason as an agent of the respondent) and was adjourned without date because of sudden illness of respondent's attorney.

September 28, 1971, trial was resumed with the continued cross-examination of said Walter C. Mason.

October 15, 1971, trial proofs were concluded in an equity case involving numerous and complex fact-legal issues, some 1,000 transcript pages of testimonial evidence and some 40 admitted evidentiary exhibits.

January 28, 1972, trial proofs were opened for taking of testimony of a polygraph examiner at instance of trial judge.

January 29, 1973, petitioners filed their motion for a new trial asserting the federal claim that it was then impossible for the trial judge (the Honorable Frank E. Jeannette) to render a disinterested and impartial judgment as guaranteed by the fair trial in a fair tribunal requirement of the Due Process Clause of the Fourteeneth Amendment.

April 16, 1973, the trial judge heard and granted the petitioners' said motion for a new trial, stated on the record his strong inclination to disqualify himself as trial judge, and stated the due process reasons for granting said motion.

May 14, 1973, an order granting petitioners a new trial was entered. (Appendix F, pages 12a-13a).

August 30, 1973 (a new trial having been noticed for September 26, 1973), said Walter C. Mason, without notice to petitioners, forwarded his letter (Appendix H, pages 14a-16a) to the late Honorable Thomas M. Kavanagh, then Chief Justice of the Michigan Supreme Court.

September 4, 1973, without notice to petitioners, the Michigan Deputy Supreme Court Administrator forwarded the Mason letter (Appendix H, pages 14a-16a) and an accompanying investigatory letter (Appendix I, pages 16a-17a) to the Macomb County Court Administrator.

At some undisclosed time prior to September 26, 1973 (the noticed day for commencement of a new trial), said Macomb County Court Administrator, without notice to petitioners, delivered the Mason letter (Appendix H, pages 14a-16a) and the said investigatory letter (Appendix I, pages 16a-17a) to the trial judge.

September 26, 1973, the trial judge met with counsel in chambers and the following transpired (as described in paragraph 12 of the unchallenged affidavit of Robert J. Lord, petitioners' trial attorney, in support of petitioners' subsequent December 10, 1973 motion for a new trial):

> "On September 26, 1973, the Honorable Frank E. Jeannette met with counsel of the parties in chambers with the Macomb County Court Administrator present for reasons unknown to plaintiffs' counsel until the Honorable Frank E. Jeannette, without disclosing a copy thereof, stated that he was disturbed concerning a letter of complaint by said Walter C. Mason and

that he was considering sua sponte setting aside the May 14, 1973 order granting plaintiffs a new trial, the Honorable Frank E. Jeannette otherwise saying in regard thereto that he had been "sold a bill of goods", the said meeting with the Honorable Frank E. Jeannette otherwise being confused, abruptly terminated when the Honorable Frank E. Jeannette left his chambers in a matter of only a few minutes, and otherwise inconsequential except for the disturbed appearance of the Honorable Frank E. Jeannette and a statement by the defendant's attorney that said Walter C. Mason was "out of control" or some such phrase; and the Honorable Frank E. Jeannette did not advise plaintiffs' counsel that he was considering sua sponte setting the May 14, 1973 order for new trial aside for the reason that he had the benefit of months and seemingly years of the trial of this action or that he must arrive at a decision, as such matters are referred to by the Honorable Frank E. Jeannette in his November 1, 1973 opinion."

September 26, 1973 (following the aforesaid meeting in chambers), the trial judge entered an order adjourning trial to the next trial call for the reason that a criminal jury trial was in progress (Appendix J, infra, pages 17a-19a); and a copy of said order was promptly mailed to petitioners' counsel.

September 28, 1973, without notice to petitioners, the Macomb County Court Administrator forwarded his response (Appendix K, infra, pages 19a-20a) to the September 4, 1973 investigatory letter of the Michigan Deputy Supreme Court Administrator (Appendix I, pages 16a-17a).

November 2, 1973, without notice, trial, motion or hearing subsequent to said order granting a new trial (Appendix F, pages 12a-13a), the trial judge filed his November 1, 1973 opinion granting judgment to the respondent (Appendix D, pages 8a-11a).

November 19, 1973, the trial judge entered his judgment in the respondent's favor (Appendix E, pages 11a-12a); and subsequently petitioners obtained from the trial judge a copy of the Mason letter (Appendix H, pages 14a-16a),

and obtained from the Macomb County Court Administrator a copy of his letter of response (Appendix K, pages 19a-20a), to the Michigan Deputy Supreme Court Administrator.

December 10, 1973, petitioners filed their second motion for a new trial asserting by reference not only their first federal claim resulting in the May 14, 1973 order for a new trial (Appendix F, pages 12a-13a), but also asserting anew a federal claim that the trial judge had deprived the petitioners of their right to a fair trial in a fair tribunal as guaranteed by the Due Process Clause of the Fourteenth Amendment, copies of the August 30, 1973 Mason letter (Appendix H, pages 14a-16a), and the September 28, 1973 letter of the Macomb County Court Administrator (Appendix K, pages 19a-20a), being attached to said motion; and subsequently petitioners obtained from the Macomb County Court Administrator a copy of the September 4, 1973 investigatory letter (Appendix I, pages 16a-17a), of the Michigan Deputy Supreme Court Administrator.

January 20, 1975, the trial judge heard petitioners' motion, the petitioners' orally asserting by counsel: "... (A)s was the case in the plaintiffs' first motion for new trial which was granted by your Honor by an order entered May 14, 1973, the present motion is grounded particularly on a federal claim, that is that the plaintiffs were denied a fair trial before a fair, disinterested and impartial tribunal as guaranteed by the due process clause of the 14th Amendment. This is the question we will take on appeal. . . ." and reading into the record the September 4, 1973 investigatory letter of the Michigan Deputy Supreme Court Administrator (Appendix L, pages 20a-21a).

April 21, 1975, the trial judge entered an order denying the petitioners' motion for a new trial (Appendix G, pages 13a-14a).

May 12, 1975, petitioners filed their claim of appeal from said order denying petitioners' motion for a new trial and from said November 19, 1973 judgment.

May 27, 1975, the trial judge entered an order, upon petitioners' motion therefor without opposition from respondent, permitting petitioners to transmit less than a full transcript on petitioners' appeal limited to the following three federal questions:

"Is a state trial court proceeding subject to the reach and force of the Due Process Clause of the 14th Amendment to the United States Constitution?

"The trial judge did not answer this question.

"Plaintiff-appellants contend the answer should be "Yes".

"Did the plaintiffs-appellants present and save a substantial federal claim and question for review?

"The trial judge did not answer this question.

"The plaintiffs-appellants contend the answer should be "Yes".

"Did the trial judge deprive plaintiffs-appellants of a fair trial in a fair tribunal, as guaranteed by the 14th Amendment, when he first entered an order granting them a new trial upon a due process motion therefor prior to any opinion or judgment on the merits, and then (a) received and entertained without notice a witness' letter of complaint and accusation so disparaging against the judge for granting a new trial as to make him an interested party, (b) then entered an order adjourning trial until the next trial call after expressing ambiguous concern about said letter to counsel in chambers without disclosing contents thereof, and (c) then without notice, trial, motion or any hearing on the merits subsequent to the said order granting a new trial, the accused judge 'sua sponte' filed an opinion permitting judgment to be entered against plaintiffs-appellants as pleaded by said witness in his said complaining and accusatory extrajudicial letter?

"The trial judge answered this question "No".

"The plaintiffs-appellants contend the answer should be "Yes"."

March 9, 1976, the Michigan Court of Appeals filed its opinion and decision (Appendix B, pages 2a-6a), affirming

the trial court's denial of petitioners' motion for a new trial asserting their Fourteenth Amendment due process claim.

April 30, 1976, the Michigan Court of Appeals entered its order (Appendix C, pages 6a-7a), denying petitioners' timely application for rehearing (Appendix M, pages 22a-24a).

August 18, 1976, the Michigan Supreme Court entered its order (Appendix A, pages 1a-2a), denying petitioners' timely application for leave to appeal pursuant to the Michigan General Court Rule 853, the first subsection of which (Rule 853.1) provides in material part:

"Appeal may be taken to the Supreme Court only upon application and leave granted, in the discretion of the Supreme Court, from any decision of the Court of Appeals, interlocutory or final, upon a showing of a meritorious basis for appeal and any one of the following grounds.

(1) The subject matter of the appeal involves legal principles of major significance to the jurisprudence of the States.

(2) The decision of the Court of Appeals is clearly erroneous and will cause material injustice.

(3) The decision is in conflict with decisions of the Supreme Court or other Court of Appeals decisions.

• • •"

the petitioners in their said application asserting a meritorious basis for appeal and grounds therefor pursuant to said Rule 853.1(1) (2) (3) (Appendix N, pages 25a-26a).

REASONS FOR GRANTING WRIT

1.

The Transcendent Importance Of Petitioners' First Question

It was in 1955 when Mr. Justice Black, speaking for a majority of this Supreme Court in *In re Murchison,* 349 U.S. 133, 136, said that a fair trial *in a fair tribunal* was a requirement of the Due Process Clause of the Fourteenth Amendment.

Coincidentally only some six years previously, Jerome Frank, the late distinguished judge of the Second Circuit Court of Appeals, published his *Courts On Trial, Myth And Reality In American Justice,* saying in his concluding paragraphs (Atheneum, N.Y., 1967, at 428-429):

> "... (W)hile concerned with the macrocosm, we dare not overlook the microcosms, the more minute factors that loom large in the lives of individual men. Courthouse ways are important among those factors. And they will be, as long as any sort of civilization endures. For that reason, I have thought it not undesirable to give the lay reader some notion of how our courts actually operate.
>
> "My attitude is precisely the opposite of that recently ascribed to judges by an English lawyer: 'A judge,' he says, 'is called upon to decide all kinds of hotly contested controversies; and this would be the most invidious of tasks if he could not 'cover up' behind a doctrine proclaiming to the world that in fact he has little or no personal discretion, and that he is compelled by ineluctable logic to the conclusions which he reaches.' This lawyer concedes that 'there is much room in the judicial process for the idiosyncracies of the particular judge to assert themselves.' But he maintains that 'the inherent uncertainty ... should be concealed from the laymen,' for the resultant delusion 'will stop the public ... from perceiving ... defects in the legal system which they may be ill-qualified to judge.' To my mind, such judicial concealment is pernicious and undemocratic to the last degree. John Q. Citizen should be told of the flaws in the workings of the courts, and should be taught how to become well-qualified to consider them — differentiating between inherent, ineradicable, difficulties in the administration of justice and those which are eradicable and should be eliminated. For, in a democracy, the courts belong not to the judges and the lawyers, but to the citizens."

The great federal due process mandate of *Murchison, supra,* evolved from *Tumey* v. *Ohio,* 273 U.S. 510, 532 (1927), ("Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."), from *In re Oliver,* 333 U.S. 257, 278 (1948), ("It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal."), and from *Offutt* v. *United States,* 348 U.S. 11, 14 (1954), ("... (J)ustice must satisfy the appearance of justice.").

More recently in *Ward* v. *City of Monroeville,* 409 U.S. 57, 61, 62 (1972), ("Nor in any event may the State trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.") this Court further evolved and reinforced the *Tumey-Murchison* Fourteenth Amendment 'fair trial in a fair tribunal' requirement.

In *Ward,* however, as in *Tumey, Oliver, Offutt* and *Murchison, supra,* the reach and force of the 'fair trial in a fair tribunal' due process requirement was applied in a context of a criminal or quasi-criminal proceeding in which the adversaries were the State, as accuser, and an individual, as the accused.

Now, throughout this country, every state criminal or quasi-criminal judicial proceeding is governed by federal standards of a fair public trial in a fair tribunal.

Not yet, however, has this Supreme Court decided to extend or not to extend its greatly evolved federal due process 'fair tribunal' standards to state tribunals adjudicating equity controversies between private parties.

The case at bar presents the important question, transcending the interests of petitioners and respondent, whether the great evolution in this Supreme Court of the 'fair public trial in a fair tribunal' due process requirement reaches for application by federal standards to civil proceedings between private adversaries before a state trial judge sitting in equity.

The answer by this Supreme Court to the first question presented by petitioners would extend to the countless state equity tribunals throughout this country.

No less than in *Tumey, Oliver, Offutt, Murchison* and *Ward, supra,* what is at stake is the federal due process purity of state judicial process and its institutions. Cf. *Kinnear-Weed Corporation* v. *Humble Oil & Refining Company,* 403 F.2d 437, 439, 440 (5 Cir. 1968), where the Fifth Circuit Court said:

> "... (A)s we several times make clear, this is a matter which transcends the interests of the parties. The purity of the judicial process and its institutions is the thing at stake. * * *"

2.

The Blanket Sterilization Of Petitioners' Federal Due Process Claim

It is not too much to say, we submit, that the deeply rooted 'fair trial' sensibilities of common men in this country are honored in the criminal import of the common law felony known as obstruction of justice; and as said by the Michigan Supreme Court in *People* v. *Coleman,* 350 Mich. 268, 274 (1957), the evil of the crime lies in attempt as well as its success.

Nor, we believe, is there reason to doubt that informed common men would easily perceive their deeply rooted 'fair tribunal' sensibilities as vindicated in *State* v. *Johnson,* 83 N.E. 702 (1908), wherein the Ohio Supreme Court reversed dismissal of Johnson's indictment for endeavoring to influence court officers by his following letter (signed by Johnson as E. T. Ryan) to three circuit judges presiding in a pending civil case between Johnson and one Mark Slater:

> "Columbus, O., 9-28, 1906.
>
> "Judges Wilson, Dustin, and Sullivan, Circuit Court, Columbus, O. — Dear Sirs: I note by the papers that Slated v. Johnson case is up to you. I am a Republican, as you gentlemen are, and I hope I am a good citizen, and I would not even suggest to you that you should in any manner violate your oaths of office or in any manner stultify yourselves in this or any cause of action that comes before you. But I would suggest that it is your duty to search very diligently to find a lawful reason to prevent such a man as Mark Slater going back into the office he has abused and disgraced, from which there is not the least doubt in the world he has stolen thousands of dollars. The man has no moral perception, and seems to believe that he had a perfect right to graft all he might on the side. The Republican Party, as you are well aware, has load enough to carry for the present without loading up again with a Slater. Yours Resp'y, E. T. Ryan."

In pertinent part, the statute under which Johnson was indicted provided:

> "Whoever, corruptly * * * endeavors to influence * * * any juror, witness or officer of any court of this state in the discharge of his duty * * * shall be fined not more than one thousand dollars or imprisoned not more than twenty days, or both."

and the Ohio Supreme Court said (at 703):

> "* * * In enacting this section of the statute the Legislature must have been prompted by a desire to promote decency and propriety in all things pertaining to the administration of justice, for they used, to qualify the endeavoring, the most comprehensive of adverbs."

As concise as the *Johnson* decision is, nothing of the actual indictable circumstances of Johnson's 'dear judge' letter is sterilized by the Ohio Supreme Court.

By comparison, the context actualities of the petitioners' federal due process claim are so sterilized by two Michigan appellate courts that no man reading either the decision of the Michigan Court of Appeals (Appendix B, pages 2a-6a) or the order denying leave to appeal of the Michigan Supreme Court (Appendix A, pages 1a-2a) could possibly assess the actual fact and appearance impact of Mason's 'dear judge' letter (Appendix H, pages 14a-16a) or of the state action by which it and the investigatory letter of the Michigan Deputy Supreme Court Administrator (Appendix I, pages 16a-17a) were delivered to and acted upon by the trial judge, altogether without notice to the petitioners.

An asserted denial of federal due process is to be tested by the totality of facts of a given case. *Betts* v. *Brady*, 316 U.S. 455, 462 (1941). The fundamental requirements of fairness, which are of the essence of due process in a judicial proceeding, are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps. *Morgan* v. *United States*, 304 U.S. 1, 19, 20 (1937).

Omitted entirely from consideration by the Michigan Court of Appeals and the Michigan Supreme Court is the chain of state action by which the Mason letter (Appendix H, pages 14a-16a) and the accompanying Michigan Deputy Supreme Court Administrator's letter (Appendix I, pages 16a-17a) secretly reached the trial judge while the petitioners, unaware and ambushed, were awaiting a new trial based upon the trial judge's order (Appendix F, pages 12a-13a) granting their federal due process claim and motion therefor.

As a matter of appearance and circumstantial impact, if not the directly provable fact, the trial judge sat in judgment of Mason's disparaging complaint against him.

Yet Mason's letter as it was (Appendix H, pages 14a-16a) is only casually referred to by the Michigan Court of Appeals (Appendix B, pages 2a-6a) as "critical of the court".

The only rationale of the Michigan Court of Appeals in rejecting the petitioners' federal due process issue (acknowledged in footnote 2 of the decision, Appendix B, pages 4a-5a) is the mechanical application of a wholly unrelated local standard concerning a wholly unrelated local motion practice. Without reference to any federal due process standard of fact or appearance, the Michigan Court of Appeals in its decision (Appendix B, pages 2a-6a) cites for authority two other Michigan Court of Appeals cases (*Irish* v. *Irish*, 59 Mich. App. 635 (1975) and *Wayne County Prosecutor* v. *Doerfler*, 14 Mich. App. 428 (1968)) applying an 'actual proof of claimed bias or prejudice' standard in the cases of motions made for disqualification of a judge pursuant to Michigan General Court Rule 405.1(3) and (8) which provides:

> "Grounds for Disqualification. The issue of disqualification of a judge to hear an action may be raised by motion of any party or by the judge upon his motion. Where a judge is disqualified from hearing an action, another judge of the same circuit shall hear the same. If no other judge is available within such circuit, the court administrator shall assign a judge from another circuit to hear such action. The judge shall be deemed disqualified to hear the action when the judge:
>
> * * *
>
> "(3) is personally biased or prejudiced for or against any party or attorney;
>
> * * *
>
> "(8) for any other reason is excluded or disqualified from sitting as a judge at the trial."

This Supreme Court has often recognized that the requirement of due process cannot be ascertained through

mechanical application of a formula. *Groppi* v. *Leslie*, 404 U.S. 496, 500 (1972).

"Due process" emphasizes fairness between the State and the individual. *Ross* v. *Moffitt*, 417 U.S. 600, 609 (1974).

By state action the Mason letter produced a trial by ambush undercutting even so much as an informed opportunity for the petitioners to make a local motion for disqualification of the trial judge.

When an asserted federal right is denied by a State court, the sufficiency of the grounds of state denial is for this Supreme Court to decide. *Titus* v. *Wallack*, 306 U.S. 282, 291 (1938).

The assertion of a federal right, when plainly and reasonably made, is not to be defeated under the name of local practice. *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923). A State court cannot sterilize a federal claim by putting on the adjudication a local label. *Angel* v. *Bullington*, 330 U.S. 183, 190 (1946).

This Supreme Court has recognized that the unhindered and untrammeled functioning of our courts is part of the very foundation of our constitutional democracy. *Cox* v. *Louisiana*, 379 U.S. 559, 562 (1965).

CONCLUSION

For the reasons set forth above, the petitioners pray for the issuance of a writ of certiorari to the Michigan Supreme Court.

Respectfully submitted,

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Fair Haven, Michigan 48023

Counsel for Petitioners

APPENDIX

INDEX TO APPENDIX

	Page
APPENDIX A. Order of Michigan Supreme Court denying petitioners' application for leave to appeal August 18, 1976	1a-2a
APPENDIX B. Opinion and judgment of Michigan Court of Appeals March 9, 1976	2a-6a
APPENDIX C. Order of Michigan Court of Appeals denying petitioners' application for rehearing April 30, 1976	6a-7a
APPENDIX D. Opinion of trial court	8a-11a
APPENDIX E. Judgment of trial court	11a-12a
APPENDIX F. Order of trial court granting petitioners a new trial	12a-13a
APPENDIX G. Order of trial court denying petitioners a new trial	13a-14a
APPENDIX H. Letter of Walter C. Mason to Chief Justice of Michigan Supreme Court August 30, 1973	14a-16a
APPENDIX I. Letter of Deputy Court Administrator of Michigan Supreme Court to Macomb County Court Administrator September 4, 1973	16a-17a
APPENDIX J. Order of trial judge adjourning trial September 26, 1973	17a-19a
APPENDIX K. Letter of Macomb County Court Administrator to Deputy Court Administrator of Michigan Supreme Court September 28, 1973	19a-20a
APPENDIX L. Partial transcript of January 20, 1975 proceedings in trial court of first instance	20a-21a

INDEX TO APPENDIX (CONT'D)

Page

APPENDIX M. Petitioners' application for rehearing in Michigan Court of Appeals.....22a-24a

APPENDIX N. Petitioners' application (in part) for leave to appeal to Michigan Supreme Court 25a-26a

APPENDIX A

WILLIAM MESHRIY and
MURSELL MESHRIY, his wife,
Plaintiffs-Appellants,

v. 58489

SUN OIL COMPANY, a New Jersey corporation,
Defendant-Appellee.

COA 24198
LC X-68-1597

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 18th day of August in the year of our Lord one thousand nine hundred and seventy-six.

Present the Honorable

Thomas Giles Kavanagh,
Chief Justice,

G. Mennen Williams,
Charles L. Levin,
Mary S. Coleman,
John W. Fitzgerald,
Lawrence B. Lindemer,
James L. Ryan,
Associate Justices

On order of the Court, the application for leave to appeal is considered, and the same is hereby DENIED, because the appellants have failed to persuade the Court that the questions presented should be reviewed by this Court.

Defendant-appellee's motion to dismiss or to summarily affirm becomes thereby moot, and the same is accordingly DENIED.

Defendant-appellee's motion to assess punitive costs and damages for a vexatious appeal is considered, and the same is hereby DENIED.

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 18th day of August, in the year of our Lord one thousand nine hundred and seventy-six.

(s) Corbin R. Davis,
Deputy Clerk

APPENDIX B

MESHRIY v. SUN OIL COMPANY

1. Appeal and Error — Briefs — Abandonment of Issues.
   Any issues which are neither raised nor briefed on appeal are considered abandoned.
2. Constitutional Law — Due Process of Law — Trial.
   Due process of law requires a fair trial and a fair determination of a controversy.
3. Trial — Trial Judges — Prejudice — Appeal and Error.
   Actual proof of claimed prejudice must be shown when an appellate court is reviewing the activities, whether judicial or nonjudicial, of a trial judge, and when none is forthcoming the appellate court must find that no violation of due process has occurred; where an appellant claims to have been prejudiced by a letter sent to and read by the trial judge but the appellant has failed to show that the trial judge was influenced by anything other than the evidence duly entered on the record, no violation of due process has occurred.

Appeal from Macomb, Frank E. Jeannette, J. Submitted January 8, 1976, at Lansing. (Docket No. 24198.) Decided March 9, 1976. Leave to appeal applied for.

Complaint by William Meshriy and Mursell Meshriy, his wife, against Sun Oil Corporation seeking reformation of a lease. Plaintiffs' motion for a new trial, made after trial but prior to judgment, was granted. The trial court later vacated the order for a new trial, *sua sponte*, and entered a judgment of no cause of action in favor of the defendant. Plaintiffs appeal. Affirmed.

Robert J. Lord, for plaintiffs.

Robert E. Childs, for defendant.

Before: DANHOF, P.J., and V. J. BRENNAN and M. J. KELLY, JJ.

DANHOF, P.J. On April 17, 1968, the plaintiffs brought the present action seeking reformation of a lease that they entered into with the defendant. Subsequent to the trial, but before judgment was entered in this matter, the plaintiffs filed a motion for a new trial on January 29, 1973. The motion was granted by the trial court in an order filed May 14, 1973. However, on November 1, 1973, the trial court vacated the above order *sua sponte* and entered a judgment of no cause of action as to the plaintiffs. The plaintiffs then made a second motion for a new trial, which was denied by the trial court on April 21, 1975.

The plaintiffs next moved the trial court pursuant to GCR 1963, 812.2(a) to permit the plaintiffs to transmit less than the full transcript of testimony on appeal. In the motion, the plaintiffs stated they would appeal from the order denying their second motion for a new trial. Further, the plaintiffs indicated they would limit the appeal to three

questions. Finally, only those transcripts subsequent to the plaintiffs' first motion for a new trial were requested for this appeal.[1] The trial court granted the plaintiffs' motion for the record on appeal.

The plaintiffs have raised three issues on appeal.[2] For obvious reasons, responding to the third issue answers

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[1] The plaintiffs stated that "the only possible transcripts of hearings pertinent, material and necessary for review" were as follows:

"the transcripts of hearings subsequent to the plaintiffs' first motion for a new trial upon federal due process grounds filed on January 29, 1973, particularly (a) the hearing on April 16, 1973 when the Court granted the plaintiffs' motion for a new trial and dictated the reasons therefor, (b) the hearing on November 19, 1973 when judgment was entered in the defendant's favor over the plaintiffs' objections and (c) the hearing on January * * * [20], 1975 when the Court denied plaintiffs' second motion for a new trial on federal due process grounds and dictated the reasons therefor." Plaintiffs' motion, filed May 8, 1975.

[2] The issues raised on appeal are stated by the plaintiffs as follows:

I.

"Is a state trial court proceeding subject to the reach and force of the Due Process Clause of the 14th Amendment to the United States Constitution?

II.

"Did the plaintiffs-appellants present and save a substantial federal claim and question for review?

III.

"Did the trial judge deprive plaintiffs-appellants of a fair trial in a fair tribunal, as guaranteed by the 14th Amendment, when he first entered an order granting them a new trial upon a due process motion therefor prior to any opinion or judgment on the merits, and then (a) received and entertained without notice a witness' letter of complaint

the first two. Any issues not expressly abandoned on appeal by the above actions of the plaintiffs will be considered abandoned in any event because plaintiffs have neither raised nor briefed and supported further issues. *Mitcham* v *Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959. See also *Opal Lake Association* v *Michaywe Limited Partnership*, 47 Mich App 354, 366; 209 NW2d 478 (1973), and *Taylor* v *Klahm*, 40 Mich App 255, 269; 198 NW2d 715 (1972).

Concisely stated, the issue raised is whether the trial court was so prejudiced by a witness's letter, which was critical of the court, that the plaintiffs were thereby denied a fair trial in a fair tribunal as required by due process of law.

Due process of law requires a fair trial and a fair determination of the controversy. *Napuche* v *Liquor Control Commission*, 336 Mich 398; 58 NW2d 118 (1953), *Milford* v *People's Community Hospital Authority*, 380 Mich 49; 155 NW2d 835 (1968).

As to the showing required on review, *Wayne County Prosecutor* v *Doerfler*, 14 Mich App 428, 441; 165 NW2d 648 (1968) stated:

> "An appellate court must demand actual proof of claimed prejudice when reviewing the non-judicial activities of a judge, and when none is forthcoming that court must find that no violation of due process has occurred."

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[2] (Continued)

and accusation so disparaging against the judge for granting a new trial as to make him an interested party, (b) then entered an order adjourning trial until the next trial call after expressing ambiguous concern about said letter to counsel in chambers without disclosing contents thereof, and (c) then without notice, trial, motion or any hearing on the merits subsequent to the said order granting a new trial, the accused Judge *sua sponte* filed an opinion permitting judgment to be entered against plaintiffs-appellants as pleaded by said witness in his said complaining and accusatory extrajudicial letter?"

Irish v *Irish*, 59 Mich App 635, 639; 229 NW2d 874 (1975), indicates that actual proof of claimed prejudice must also be shown "where the judicial activities of a judge are involved."

A review of those transcripts requested by the plaintiffs for this appeal fails to show any proof of the claimed prejudice on the part of the trial judge as a result of the letter. Quite the contrary, the trial judge consistently maintained that his decision to set aside the order granting the plaintiffs' motion for a new trial and enter a judgment for the defendant was based upon his finding from the testimony that the plaintiffs had failed to carry the burden of proof. As the plaintiffs have failed to show that the trial judge was influenced by anything other than the evidence duly entered on the record, we find no violation of due process has occurred.

Affirmed. We do find, however, that the unfortunate delay below was not attributable to either party and we therefore decline to award costs.

APPENDIX C

WILLIAM MESHRIY and
MURSELL MESHRIY, his wife,
Plaintiffs-Appellants,

v.

SUN OIL COMPANY, a New Jersey corporation,
Defendant-Appellee.

COA 24198
LC X-68-1597

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 30th day of April in the year of our Lord one thousand nine hundred and seventy-six.

Present the Honorable

Robert J. Danhof, C.J.
Presiding Judge

Vincent J. Brennan,
Michael J. Kelly,
Judges

In this cause an application for rehearing has been filed by the plaintiffs-appellants and answer in opposition thereto having been received, and due consideration thereof being had by the Court,

IT IS ORDERED that the motion for rehearing be, and the same is hereby DENIED.

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

(SEAL)

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 4th day of May in the year of our Lord one thousand nine hundred and seventy-six.

(s) Ronald L. Dzierbicki,
Clerk

APPENDIX D

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF MACOMB

WILLIAM MESHRIY and
MURSELL R. MESHRIY, his wife,
Plaintiffs,
v. Case No. X-68-1597

SUN OIL COMPANY, a
New Jersey Corporation,
Defendant.

OPINION OF TRIAL COURT

This action was filed April 17, 1968. Plaintiff Meshriy seeks as to Count I to have certain instruments, more particularly identified as Exhibits A, B, C, and D, rescinded, or cancelled, or both, and adjudging the same to be null and void.

As to Count II, Plaintiff seeks to have Exhibits B and E Land Leases reformed so as to express, contain and embody the agreement and the intentions of the parties.

Defendant Sun Oil denies any mistake or fraud was perpetrated by defendant or its agents upon plaintiffs at any time.

It is interesting to note the calendar entries which are incorporated by reference as this courts Addendum "A" to this opinion. The four pages clearly indicate the many motions, hearings and days of trial spent on this matter. The entries further emphasize the perplexities and complications this Court encountered in its effort to attempt to resolve and/or try this matter.

Delays in the trial were occasioned by several reasons:

1. Death of Mrs. Lord, wife of Plaintiff attorney.
2. Death of Mrs. Childs, wife of Defendant attorney.

3. Hospitalization for surgery of trial Judge.
4. Several requests for adjournments by either plaintiff attorney or defendant attorney, or both, for various reasons.

Further, it should be noted that the matter has been before the Court on numerous occasions for settlement conferences; but, due to the antagonism of the principles, it has been impossible for this Court to accomplish amicable resolution of the matter. Further, the multitudinous pleadings and seemingly endless motions prior to trial, during trial, and subsequent to trial have created a maze, to say the least.

The Court, having heard all of the testimony to be offered in this case, as the tryer of fact, determines, as stated above, that the sole question to be determined is whether or not co-plaintiff, MURSELL R. MESHRIY, did, in fact, sign the lease and the memorandum thereof.

The Court did, on May 14, 1973, order a new trial on the motion of the plaintiff.

That on September 26, 1973, the Court, in a conference with counsel for the plaintiffs and defendant, advised them Sua Sponte that said order is being set aside for the reason that no further information can be gained by another trial in this cause. That this Court has had the benefit of months and seemingly years of the trial of this cause. The Court, as tryer of the fact, must arrive at a decision.

The Court has had the benefit of the testimony of witnesses, including MURSELL R. MESHRIY and, likewise, the testimony of the subscribing witness, W. C. Mason. It is the conclusion of the Court, after having benefit of the testimony of the witnesses in open Court and having made its observation of the nature of the testimony, the conduct of the witnesses, and their general recollection of the events, that MURSELL R. MESHRIY did, in fact, sign the lease and the memorandums thereof. The plaintiffs in this cause of action had the burden of showing through a preponderance of the proof that the signature was not, in fact, that of the plaintiff or, in the alternative,

that it was obtained through fraud or misrepresentation. The Court, as tryer of the fact, does not find that such is the case. It appears that it is a question of the plaintiff making a poor economic bargain; and, as the result of hindsight, attempting to challenge it on various bases above discussed. The Court does not find that there is a preponderance of proofs offered by the plaintiff that MRS. MESHRIY, IN FACT, did not sign the lease; or, in the alternative, that her signature was obtained by fraud or misrepresentation.

It should be noted that during the course of a trial, it clearly appeared that the testimony of one of the plaintiffs, MURSELL MESHRIY was, in many areas, completely contradictory to the testimony of WALTER C. MASON, one of the defendants witnesses. During one of the many in chamber discussions a polygraph examination was discussed and finally agreed to. Both attorneys were instrumental in the selection of Robert C. Cummins who gave the polygraph examination. After the examination and the results announced, plaintiffs attorney objected to the findings, stating he did not have an opportunity to cross-examine Mr. Cummins. Mr. Cummins was brought into court and Mr. Lord had the opportunity of examining Mr. Cummins. Although aware of the polygraph finding, it should be noted that this Court in no way considers the result thereof. This Court had arrived at a determination solely predicated upon the facts and testimony offered in open Court, but had hoped that the parties could avail themselves of this means to satisfy themselves in this dispute.

The Court feels a duty, as above indicated, to render this decision and vacate the order for new trial Sua Sponte predicated on the above facts. It should be noted that this Court has reviewed the transcripts of the greater part of the testimony offered in this cause prior to the entry of this opinion. It being conservative to estimate that the transcripts comprise the essential testimony of the various parties and consist of in excess of five hundred (500) pages. A further trial of the cause could result in no more thorough or comprehensive offering of testimony than that before the Court at this time.

Therefore, an Order vacating the prior order for new trial should enter. Further, as above stated the Court finds that the plaintiff has not sustained the necessary burden of proof and therefore a Judgment for No Cause of Action as to the Plaintiff shall enter.

Said Order and Judgment should be presented or noticed for hearing within ten (10) days from date hereof.

Dated: November 1, 1973.

(s) Frank E. Jeannette
Circuit Judge

APPENDIX E

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE

COUNTY OF MACOMB

WILLIAM MESHRIY and
MURSELL R. MESHRIY, his wife,
Plaintiffs,

v. File No. X-68-1597

SUN OIL COMPANY, a
New Jersey Corporation,
Defendant.

FINAL JUDGMENT FOR DEFENDANT

At a session of said Court held at the Macomb County Court Building in the City of Mount Clemens, Michigan, on this 19th day of November, 1973.

PRESENT: HONORABLE FRANK E. JEANNETTE,
Circuit Judge

The court having signed and filed its Opinion dated November 1, 1973, and following a trial of ten days without

a jury and the court reciting in its Opinion the findings of fact, counsel for the respective parties having presented oral and written arguments to the court, and the court having read the testimony of the various parties and witnesses (the transcript of which was in excess of 500 pages), and after a thorough review of the large number of exhibits filed in this case and prior motions,

IT IS HEREBY ORDERED AND ADJUDGED that the verdict of the court as embodied in its Opinion dated November 1, 1973, upon motion of counsel for defendant, since the plaintiffs have not sustained the necessary burden of proof, that a final judgment for the defendant and against the plaintiffs be and is hereby entered.

IT IS FURTHER ORDERED AND ADJUDGED that costs be taxed for defendant against plaintiffs in the sum of $175.00.

(s) Frank E. Jeannette
Circuit Judge

APPENDIX F

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF MACOMB

William Meshriy and
Mursell R. Meshriy, his wife,
Plaintiffs.

v. Case No. X-68-1597

Sun Oil Company, a
New Jersey Corporation,
Defendant.

ORDER GRANTING NEW TRIAL

At a session of said Court held at the Macomb County Building in the City of Mount Clemens, Michigan, on May 14, 1973.

PRESENT: HON. FRANK E. JEANETTE, Circuit Judge

The plaintiffs' motion for a new trial having been brought on for hearing; and counsel for the parties having been heard and the Court being fully advised in the premises and having dictated a statement of reasons for granting plaintiffs' motion.

Now, therefore, on the motion of Robert J. Lord, attorney for the plaintiffs,

IT IS ORDERED that the plaintiffs be and they hereby are granted a new trial.

Frank E. Jeannette
Circuit Judge

APPENDIX G

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF MACOMB

William Meshriy and
Mursell R. Meshriy, his wife,
Plaintiffs,

v. Case No. X-68-1597

Sun Oil Company, a
New Jersey Corporation,
Defendant.

ORDER DENYING NEW TRIAL

At a session the Macomb County Circuit Court held this 21st day of April, 1975, before the Hon. Frank E. Jeannette.

ORDER DENYING RE-NOTICE OF HEARING OF MOTION AND REQUEST FOR SEPARATE MOTION RECORD AND DENYING ORDER FOR NEW TRIAL

Plaintiffs, appearing by their attorney, Robert J. Lord, defendant, appearing by its attorney, Robert E. Childs, after oral argument having been heard thereon; the plaintiffs' motion for a new trial having been brought on for hearing; and counsel for the parties having been heard and the Court being fully advised in the premises and having dictated a statement of reasons for denying plaintiffs' motion;

Now, therefore, on the motion of Robert E. Childs, attorney for the defendant,

IT IS ORDERED that the plaintiffs' motion for a new trial is hereby denied.

(s) Frank E. Jeannette
Circuit Judge

APPENDIX H

(RECEIVED — Aug. 31, 1973; T. M. Kavanagh, C.J.)

31517 Kelly
Fraser, Michigan 48026

August 30, 1973

Honorable Chief Justice
Thomas A. Kavanaugh
Supreme Court Justice
State of Michigan
Lansing, Michigan

Dear Sir:

I have mixed feeling as I write this letter and it is because I have always had the highest regard for the judiciary but with my latest experience my feelings have changed drastically.

Let me explain the situation. Back in 1966 I worked for the Sun Oil Company covering an area from East of Woodward Avenue in Detroit from the Detroit River North to Port Huron, Michigan. My job was to acquire sites for service stations, either by purchase or lease. At the corner of 12 Mile-Gratiot, (Northwest corner) I developed a land lease. At the time of the signing of the lease I witnessed the signature of a Mrs. Meshriy, then had Mr. Meshriy sign in my wife's presence as lessee at my home, then notarized the signatures. This action is the crux of the plaintiffs' case but this is not why I am writing you. We went to trial before Judge Jeannette, Macomb Circuit Judge, Mt. Clemens, Michigan. After three straight weeks of testimony by both sides and approximately fourteen months of on again, off again tactics the trial finally concluded — there was no jury. In the latter stages of the trial it was decided by all parties that a polygraph test should be given Mrs. Meshriy and myself the results of which were to be a guide to the Judge. Needless to say the results of my test were positive and the opposition very negative. I don't know if this caused Judge Jeannette problems but in the final analysis there was no decision rendered by him and none to date. In the meantime he has stated that a new trial would be started September 26th, 1973. I am not a lawyer but it seems to me that he should have made a decision before granting a new trial. This is why I am writing you. The attorney for Sun Oil is reluctant to do or say anything for fear of antagonizing the Judge and of course the other attorney has another chance of presenting a new case with hopes of doing a better job.

Another little item, I no longer work for Sun Oil Company, but, because I am a principal in the litigation I am a star witness. After my attorney informed the Judge that I was no longer in the employ of the Sun Oil Company and that it wasn't right for me to have to spend so much time in Court without some reimbursement to my present employer, the Judge's remark was "Mr. Mason will get his reward in Heaven."

I realize that I can reap the displeasure of my former company's attorney as well as the Judge and for that matter

you, yourself. I just can't believe that our judicial system is so mired down in politics that when and if a Judge is out of line there is no recourse for anyone to have him straightened out. I feel Judge Jeannette is wrong and out of line in his action. He should give a decision because everything that could be said has been said, a new trial will accomplish nothing. I understand that he may hear the same trial again, no other Judge would consider hearing this case after fourteen months, I am certain.

If I am wrong I apologize for bothering you but if what the Judge has done and is doing is not procedurally correct then I think he should be reprimanded accordingly. I may be wrong in taking this approach but if the judiciary system is to work for all people then the responsible people in the system, more particularly the judges, should be firm and competent and fair in their decisions and actions. I attach hereto a copy of the first page of the transcript so as to give you the pertinent information you may need.

I would appreciate an answer from you one way or another but soon. Thank you for your patience and understanding in this matter.

Sincerely,

(s) Walter C. Mason
Walter C. Mason

APPENDIX I

Supreme Court
Office of the Court Administrator
Law Building - Box 88
Lansing, Michigan 48901

September 4, 1973

Mr. Salvatore Crimando
Court Administrator
County Building
Mt. Clemens, Michigan 48043

Re: William Meshriy and Mursell Meshriy, His wife, vs.
Sun Oil Company, a New Jersey Corporation
Macomb County File No. X68-1597

Dear Sam:

We are enclosing a copy of a complaint letter written to the Chief Justice by Walter C. Mason regarding captioned case.

Could you please inform us of the facts in this case so that we can intelligently reply to Mr. Mason's letter of August 30?

We appreciate your usual fine assistance in these matters.

Cordially,

(s) Austin,
Deputy Court Administrator

AJD:eb
Enclosure
cc: Hon. Thomas M. Kavanagh

APPENDIX J

State of Michigan

In the Circuit Court for the County of Macomb

No. X-68-1597

MESHRIY,
Plaintiff.

vs.

SUN OIL CO.,
Defendant(s).

Atty: R. Lord
8388 Dixie Hwy. Fair Haven

Atty: W. Jackson
25191 Gratiot, Roseville

Atty: R. Childs
P.O. Box 2205, Dearborn

ORDER

( ) OF DISMISSAL

(x) FOR ADJOURNMENT

( ) FOR COSTS

At a session of said Court, held in the City of Mount Clemens, on Sept. 26th, 1973.

This cause having been regularly noticed for ( ) Discovery Pre-Trial, ( ) Pre-Trial Conference, (x) Trial, ( ) Motion for....., and having been called, and

( ) The (Plaintiff) (Defendant) having failed to attend;

( ) (Plaintiff's) (Defendant's) All counsel having requested an adjournment;

( ) it appearing that service has not been had upon the defendant(s);

( ) it appearing that the matter has been settled;

Criminal jury trial in progress

( ) The Motion is (granted) (denied).

( ) Now therefore, IT IS ORDERED,
that this (motion) (cause) be, and the same is hereby DISMISSED, (without) (with) prejudice.

(x) Now therefore, IT IS ORDERED,
that this cause be, and the same hereby is, ADJOURNED to *next trial call.*

( ) IT IS ORDERED
that costs be, and the same hereby are, assessed against (Plaintiff) (Defendant) in favor of the (Plaintiff) (Defendant) (County) in the amount

of $.....dollars, payable within..... days from this date.

(s) Frank E. Jeannette
Circuit Judge

APPENDIX K

(Letterhead of The Sixteenth Judicial Circuit of Michigan)

September 28, 1973

Mr. Austin J. Doyle
Deputy Court Administrator
Supreme Court
Lansing, Michigan 48901

Re: William Meshriy and Mursell Meshriy, his wife, vs. Sun Oil Company, a New Jersey Corporation
File: X-68-1597

Dear Austin:

I must first apologize for the delay in responding to your letter concerning the above, but because of the Judicial Conference as well as Judge Jeannette's involvement in a prolonged homicide trial, we were unable to sit down to discuss this matter.

There were many delays in the trial of this matter caused in part by Judge Jeannette's illness and the deaths of the wives of both counsel. Further delays were necessitated by the inability of counsel to appear because of conflicts in scheduling. As recently as two weeks ago, when Judge Jeannette attempted to meet with counsel, he was rebuffed again because of conflicts in schedule and the remarriage of one counsel. He, however, did meet with counsel on September 26th and informed them that for the past few weeks he had been seriously considering setting aside his

Order for new trial and entering an Opinion Sua Sponte, based on the testimony already heard.

If the Judge decides to take this action, this will eliminate the necessity of a re-trial. I am sure the Judge will give this his prompt attention upon completing the murder case which is now in its fifth week.

If I can be of further assistance, please call upon me.

Very truly yours,

Salvatore Crimando
Court Administrator

SC/mas
cc: Honorable Frank E. Jeannette

APPENDIX L

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF MACOMB

WILLIAM MESHRIY and
MURSELL R. MESHRIY, his wife,
Plaintiff,

v. No. X-68-1597

SUN OIL COMPANY, a New Jersey
corporation,
Defendant.

Proceedings had before the HONORABLE FRANK E. JEANNETTE, P15474, Circuit Judge, Mount Clemens, Michigan, on Monday, January 20, 1975.

APPEARANCES:

ROBERT LORD, Esq.
Attorney at Law
Appearing for and on behalf of the Plaintiff:

ROBERT CHILDS, Esq.
Attorney at Law
Appearing for and on behalf of the Defendant:

• • •

(6)

MR. LORD: Just sticking to the five minutes as was the case in the Plaintiff's first motion for new trial which was granted by Your Honor by an order entered May 14, 1973, the present motion is grounded, particularly on a federal claim, that is that the Plaintiffs were denied a fair trial before a fair disinterested and impartial tribunal as guaranteed by the due process clause of the 14th Amendment. This is the question we will take on appeal. This is why I'm interested in a special record on this particular question.

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APPENDIX M

STATE OF MICHIGAN
IN THE COURT OF APPEALS

WILLIAM MESHRIV and
MURSELL MESHRIV, his wife,
Plaintiffs-Appellants,

v. No. 24198

SUN OIL COMPANY, a New Jersey
corporation,
Defendant-Appellee.

APPLICATION FOR REHEARING

The plaintiffs-appellants by their attorneys hereby make their application for a rehearing of this action on appeal on the substantial ground that this Court, clearly as shown by its March 9, 1976 opinion, erroneously applied state instead of the correct federal standards in deciding the federal due process claim which was presented and saved below, and in this Court of Appeals, for federal review for the following reasons:

1. Michigan courts, trial and appellate, have the solemn responsibility equally with the federal courts to guard, enforce and protect every right granted or secured by the Constitution of the United States. *Allee* v *Medrano*, 416 US 802, 835 (1974), Mr. Chief Justice Burger, joined by Mr. Justice White and Mr. Justice Rehnquist, concurring in the result in part and dissenting in part, citing *Steffel* v *Thompson*, 415 US 452, 460-461 (1974) and *Robb* v *Connolly*, 111 US 624, 637 (1884).

2. The Michigan Supreme Court (*In re Oliver*, 318 Mich 7 (1946)) applied state instead of federal standards in rejecting a federal due process claim and was consequently reversed by the United States Supreme Court. *In re Oliver*, 333 US 257 (1947).

3. The Michigan Supreme Court (*In re White*, 340 Mich 140 (1954), and *In re Murchison*, 340 Mich 151 (1954)) applied state instead of federal standards in rejecting another federal due process claim and was consequently, on certiorari, reversed again by the United States Supreme Court. *In re Murchison*, 349 US 133 (1955).

4. In *Joint Anti-Fascist Refugee Committee* v *McGrath*, 341 US 123 (1950), Mr. Justice Frankfurter, concurring, said at 162-163:

> "... "(D)ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decision, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process."

and at 174:

> "... Due process is not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness. Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances."

5. To perform its high function in the best way justice must satisfy the appearance of justice. *Murchison, supra,* at 136.

6. This appeal does not involve a GCR 1963, 405 motion claim or question, subrule 405.1(3) providing: ". . . The judge shall be deemed disqualified to hear the action when the judge: . . . (3) is personally biased or prejudiced for or against any party or attorney . . ."

7. State standards involving GCR 1963, 405 motions to disqualify a judge, such as concerned this Court of Appeals in *Wayne County Prosecutor* v *Doerfler*, 14 Mich App 428 (1968) and *Irish* v *Irish*, 59 Mich App 635 (1975), are wholly unrelated and wholly irrelevant to federal standards applied by federal courts to guard, enforce and protect rights granted and secured by the Due Process Clause of the Fourteenth Amendment.

8. The particular state concerns and reasoning of *Irish, supra,* at 639 (". . . Actual proof of prejudice must be presented before a trial judge will be disqualified.") are wholly unrelated and wholly irrelevant to the federal due process claim presented and saved below for review by federal and not state standards.

9. The record of this action as appealed excludes review of any state question.

10. The solemn responsibility of this appellate court and the majesty of the Due Process Clause of the Fourteenth Amendment combine strongly to urge rehearing with or without oral argument as this Court may deem appropriate.

(s) Robert J. Lord
8388 Dixie Highway
Fair Haven, Michigan 48023
725-4231

Attorney for Plaintiffs-Appellants

Dated: March 29, 1976

APPENDIX N

STATE OF MICHIGAN
IN THE SUPREME COURT

WILLIAM MESHRIY and
MURSELL MESHRIY, his wife,
Plaintiffs-Appellants,

v. No. 58489

SUN OIL COMPANY, a New Jersey corporation,
Defendant-Appellee.

C/A No. 24198
L.C. No. X68-1597

APPLICATION FOR LEAVE TO APPEAL

Plaintiffs-appellants make this application for leave to appeal from a final decision of the Court of Appeals (copy attached) upon appeal of right from the trial court's order (copy attached) presenting three federal due process claims and questions timely saved in the trial court for state and federal review.

MERITORIOUS BASIS FOR APPEAL

Plaintiffs-appellants submit that they herein show a meritorious basis for appeal because they seek to vindicate in a state court their personal rights to a fair trial in a fair state tribunal as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution as did the state litigant in *Crampton* v *Department of State*, 395 Mich 347 (1975).

Appendix N

GROUNDS

Plaintiffs-appellants further make this application upon the following GCR 1963, 853.1(1)(2)(3) grounds:

1. The federal due process subject matter of the appeal involves a legal principle of major significance to the jurisprudence of the State because state courts, equally with the federal courts, have the solemn responsibility to protect and enforce every right secured by the federal constitution.
2. The decision of the Court of Appeals is clearly erroneous because an irrelevant state standard was applied to the main federal due process claim and question presented.
3. The decision of the Court of Appeals will cause the plaintiffs-appellants material injustice because they will be denied a fair trial in a fair state tribunal.
4. The decision of the Court of Appeals is in conflict with decisions of this Supreme Court.

• • •